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No. 24

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

REGULAR COMMON CARRIER CONFERENCE
OF AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellant

v.

HENRY E. DRUM, ET AL.,
Appellees

On Appeal from the United States District Court for the Western District of Oklahoma

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BRIEF FOR THE REGULAR COMMON CARRIER CONFERENCE

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In The

Supreme Court of the United States

October Term, 1961

No. 24

Regular Common Carrier Conference
Of American Trucking Associations, Inc.,
Appellant

v.

Henry E. Drum, et al.,
Appellees

On Appeal from the United States District Court for the Western District of Oklahoma

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BRIEF FOR THE REGULAR COMMON CARRIER CONFERENCE

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Oklahoma (R. 13-24) was handed down on August 13, 1960, and is reported at 193 F. Supp. 275. The report and order of the Interstate Commerce Commission (R. 144-167) is reported at 79 M.C.C. 403.

JURISDICTION

The judgment of the District Court (R. 25) was entered on August 13, 1960, and notice of appeal was filed in that

Court by the Regular Common Carrier Conference of the American Trucking Associations, Inc. (R. 29-30), on October 12, 1960. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b) and is sustained by the following decisions: *American Trucking Assns.* v. *Frisco Transp. Co.*, 358 U. S. 133 (1958); *Minneapolis & St. L. R. Co.* v. *United States*, 361 U. S. 173 (1959); *Florida Lime & Avocado Growers* v. *Jacobson*, 362 U. S. 73 (1960); and *American Trucking Assns.* v. *United States*, 364 U.S. 1 (1960). Probable jurisdiction was noted March 20, 1961.

STATUTE INVOLVED

The statute involved in this case is the Interstate Commerce Act, 49 U.S.C. § 1 et seq. The relevant sections of that Act are set forth verbatim in the appendix attached hereto and include:

The National Transportation Policy, 49 U.S.C. preceding § 1.

Section 203(a)(15), Definition of "contract carrier by motor vehicle," 49 U.S.C. 303(a)(15).

Section 203(a)(16), Definition of "motor carrier," 49 U.S.C. 303(a)(16).

Section 203(a)(17), Definition of "private carrier of property by motor vehicle," 49 U.S.C. Section 303(a)(17).

Section 203(c), Regulation of For-Hire Transportation, 49 U.S.C. 203(c).

Section 209(a)(1), Permits for Contract Carriers by Motor Vehicle, 49 U.S.C. 309(a)(1).

QUESTION PRESENTED

Whether, when an individual leases a vehicle owned by him to a shipper, accepts "employment" by the same shipper as a driver, ordinarily of the same vehicle, bears *all* expenses incidental to performing transportation of

the shipper's goods, is compensated for both his vehicle and his service as a driver solely upon the basis of the transportation actually performed, and thereby bears the entire risk of profit and loss (the shipper not guaranteeing to provide any freight or call upon the individual for any service whatever), the transportation so performed constitutes private carriage by the shipper of its own property or transportation for-hire on the part of the individual.

STATEMENT

The Oklahoma Furniture Manufacturing Co. (Oklahoma), one of the appellees, is engaged in the manufacture of furniture at Guthrie, Okla., which it sells to retail dealers throughout the United States (R. 40, Ex. 1, R. 43, 104). A substantial portion of Oklahoma's freight (outbound shipments of furniture and inbound shipments of raw materials), moves in trailers owned by Oklahoma (R. 40-41). Motive power to transport these trailers is provided in two ways (R. 40-41), the distinction between the two being one of the most significant aspects of the case.

Oklahoma owns 6 tractors (R. 41) and, in addition, leases a tractor from each of the several individual appellees (the individual plaintiffs below) (R. 40). Both the company-owned tractors and the leased tractors are used to effectuate the movement of Oklahoma's trailers in interstate commerce.

Each of the owner-operators (the individual appellees) from whom a tractor is leased is also "employed" by Oklahoma as a driver (R. 42). Ordinarily, as found by the court below (R. 16), the leased tractors are utilized for long hauls (R. 79) and each is driven by its owner (R. 76, 81). Oklahoma regularly employs 6 other drivers to operate the company-owned tractors (R. 41). These company-owned tractors, operated by the 6 salaried drivers, are ordinarily used for short hauls (R. 73, 78).

The tractor leases executed between Oklahoma and each of the owner-operators generally provide for compensation at a specified rate per mile depending upon the size of trailer transported and the direction of movement (Ex. 2, R. 43, 109; R. 46-48, and R. 54-55).[1] They require the owner-operators to bear all operating costs including license fees. Though they provide that Oklahoma will maintain and repair the equipment, this provision is inconsistent with the union contract (Ex. 5, R. 43, 128), discussed below, and in fact, as found by the Interstate Commerce Commission (R. 149), and by the court below (R. 16), each owner-operator maintains his own vehicle (R. 51, 53, 56, 60, 67). The leases further specify that Oklahoma will not be liable for wear, tear, and depreciation nor for any damage caused to the equipment by accident, theft, fire or any other hazard or casualty (R. 111). The lease does not provide any fixed or minimum rental and if a vehicle is not used, no payment is due. (Ex. 2, R. 109-113). In short, Oklahoma has effectively arranged to purchase one essential element of transportation on a strictly transportation basis (compensation per mile) and has avoided any of the incidental expenses or obligations.

With respect to drivers—the other essential element of transportation—Oklahoma entered into a union contract (Ex. 1, R. 43, 104; Ex. 5, R. 43, 128), which carefully distinguishes between employee drivers and the owner-operator drivers (R. 140). Under it the employee drivers receive a regular salary plus 2 cents per mile for actual driving (R. 140, R. 73-74, 78). The owner-operator drivers are paid on a mileage basis—5 cents a mile for driving outbound and 6 cents a mile for backhauls of raw materials (R. 142-143; R. 78). The owner-operator drivers, as noted above, are required to maintain their own equip-

[1] The leases provide that the owner-operators receive a higher rate per mile for inbound transportation of raw materials than for the outbound movement of furniture (Ex. 2, R. 43, 109).

ment. (R. 143). They are also required to pay their own living expenses while on the road (R. 143). The contract contains a provision guaranteeing employees 6 hours work or pay if they report for work at their usual or regular time and specifically states that this provision will not apply to the owner-operators (R. 132, 142).

The owner-operators actually work only when called by Oklahoma (R. 69). The company is not bound to use their services, and if they are not used they receive no pay (R. 63, 78, 86). Thus, with respect to the owner-operators, Oklahoma has effectively arranged to purchase the second essential element of transportation—the driver service—on a purely transportation basis (compensation per mile) and again has avoided any of the incidental expenses or obligations.

Viewing the arrangements entered into by Oklahoma to both "lease" equipment and "employ" the owners thereof as drivers, it is apparent that the substance is simply the purchase of transportation service. Neither the lease nor the union contract binds Oklahoma in any fashion except to pay compensation at the specified per mile rates when transportation is actually performed. When Oklahoma does call upon the owner-operators to provide transportation service it undertakes no transportation obligations and assumes no risk.

It is true that the lease agreements provide that Oklahoma has the sole right to control the use of the vehicle. But in practice that control consists at most of deciding when and where trucks are to move, accomplishing the loading, and selecting (if, indeed it does) the shortest route as the route upon which compensation will be based. Indeed, the record shows that the "control" exercised by Oklahoma with respect to the routing of vehicles consists of having once given the individual owner-operators a route book or route sheet which shows the short route between various points in the United States. Witness

Kennedy, Oklahoma's truck superintendent, testified that the drivers "should have in their possession, they did have at one time if they haven't lost them, one of those route sheets and they had better take the short route, yes, sir." (R. 72). It is clear that Oklahoma does not purport to manage the operation of leased vehicles in the actual movement, does not designate the route to be followed for each individual movement, and has no interest in the routes actually followed by the owner-operators inasmuch as compensation will only be paid for the short route.

To summarize, the owner-operators bear *all* of the expense incident to the performance of transportation in their own equipment. Moreover, they bear all of the risks attendant upon such operations,[2] with the sole exception of public liability and property damage insurance, which is furnished by Oklahoma (R. 55). In consequence, Oklahome receives a transportation service at a fixed cost per mile. The investment of time and money in the hope of profit but with the attendant risk of loss is that of each of the owner-operators.

The Interstate Commerce Commission concluded that transportation performed under the arrangements described constitutes carriage for-hire on the part of the individual owner-operators (R. 161). It further concluded that such transportation was unlawful in the absence of

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[2] Witness Walker, Vice President of Oklahoma, testified in substance that one of the benefits to Oklahoma is that the owner-operators bear the risks. He said (R. 82):

> "Well, when a man owns his own equipment, why, it's perfectly natural that he's going to be more particular with it, he's going to see that it's kept in good running condition, he's going to be very particular not to have an accident because if he should, why, it comes out of his pocket, and everything considered, why, our experience has proved that from every standpoint that you look at it the company is much better off where the owner of the equipment operates it."

appropriate authority issued pursuant to the requirements of the Interstate Commerce Act, and it entered an order requiring the owner-operators to cease and desist from such unlawful transportation. The United States District Court for the Western District of Oklahoma apparently concluded that the transportation performed by the individual owner-operators was bona fide private carriage on the part of Oklahoma, and vacated, set aside and annulled the order of the Interstate Commerce Commission (R. 24, 25).

SUMMARY OF ARGUMENT

In evaluating the relatively simple body of record facts the remedial and broad scope of the act must be seen in focus. If the objectives of the act, clearly stated in the controlling National Transportation Policy, may be lightly regarded and easily avoided, the whole scheme of regulation may be thwarted. This result both the Commission and the courts have sought to prevent.

The body of facts must be treated as a whole and, in this treatment, they must be properly related and rightly evaluated. Moreover, the facts must be seen as producing results. The group fact situations at bar, consciously created and intentionally arranged, may not thereafter be individually fragmented. To separate, isolate and insulate the facts will produce error. This, we respectfully submit, has been done, contrary to precedent.

Who was here transporting the goods? The conjunction of facts demonstates that it was the owner-operator drivers. In the total enterprise they bear the full risk of loss. Indirection is to be avoided and substance and reality allowed to prevail. Where substance and reality are present their normal and legal effect may not be diluted by the intrusion of the insubstantial and unreal.

ARGUMENT

The Broad Scope of the Interstate Commerce Act

Insofar as this appellant has been able to determine, this case, involving as it does the question of the type of carriage being performed with leased vehicles driven by the owners thereof, is one of first impression in this Court. A number of substantially similar cases have, however, come before the District and Circuit Courts and particularly before the Court of Appeals for the 10th Circuit, the jurisdiction within which the decision being appealed was rendered.[2]

This proceeding presents an issue of nationwide significance which is of especial importance to the motor transportation industry and thereby to the public. The decision of the court below held that the described transportation arrangements constitute private carriage by the lessee-employer, although that person does nothing but pay for transportation service performed by another.

Transportation costs and charges have been and remain compulsive temptations for designing means to escape regulation. Yet, the public interest in regulated transportation is broad and pervasive as evidenced by the forceful language of the National Transportation Policy (See Appendix). By its terms that policy establishes the fundamental principle that any and all arrangements for

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[2] See, e.g., *Georgia Truck System* v. *Interstate Commerce Commission*, 123 F. 2d 210 (5th Cir., 1941); *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, 78 F. Supp. 13 (D. Minn., 1948); *Interstate Commerce Commission* v. *Werner*, 106 F. Supp. 497 (E.D. Ill., 1951); *Isner* v. *Interstate Commerce Commission*, 90 F. Supp. 361 (E.D. Mich., 1950); *A. W. Stickle Co.* v. *Interstate Commerce Commission*, 128 F. 2d 155 (10th Cir., 1942), cert. denied 317 U.S. 650; *Lamb* v. *Interstate Commerce Commission*, 259 F. 2d. 358 (10th Cir., 1958); and *B & C Truck Leasing, Inc.* v. *Interstate Commerce Commission*, 283 F. 2d. 163 (10th Cir., 1960).

transportation in interstate commerce substantially equating regulated transportation must be carefully scrutinized. Both Congress and the Interstate Commerce Commission, in recognition of that principle, have expressed deep concern about the threat to regulated transportation posed by various arrangements which seek the guise of private carriage.[4] And this threat has been recognized by the courts.[5]

The critical issue posed by the decision of the court below is whether the dividing line between private carriage and regulated carriage may properly be found so close to the latter category that transportation purchased by a shipper who assumes none of the burdens or risks of conducting such service may be held to be private carriage. The issue is strikingly presented by the sharp contrast between the decision of the court below and that of the 10th Circuit Court of Appeals in *B & C Truck Leasing, Inc.* v. *Interstate Commerce Commission*, 283 F. 2d 163, 164-165, where the following appears:

> "* * * The Act is highly remedial in nature; and in order to effectuate its purposes in the public interest, it is to be liberally construed. *Its terms are sufficiently broad and comprehensive in scope to bring within its reach all those who are in substance engaged in the business of transporting property by motor vehicle on the public highways for hire, no matter the method or procedure employed.* And compliance with its regulatory exactions is not to be evaded through means of subtle arrangements or shades of forms if the substance and effect of the operation bring it within the purview of the Act.

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[4] See the reports of the Committees on Interstate and Foreign Commerce of the House of Representatives and of the United States Senate recommending passage of the Transportation Act of 1958 (H.R. Rep. No. 1922, 85th Cong., 2d Sess., and S. Rep. No. 1647, 85th Cong., 2d Sess.).

[5] *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, 78 F. Supp. 13, 19-20 (D. Minn., 1948).

A. W. Stickle & Co. v. *Interstate Commerce Commission*, 10 Cir., 128 F. 2d 155, certiorari denied 317 U. S. 650, 63 S.Ct. 46, 87 L.Ed 523; *Lamb* v. *Interstate Commerce Commission*, 10 Cir., 259 F. 2d 358; *Vincze* v. *Interstate Commerce Commission*, 9 Cir., 267 F.2d 577." (Emphasis added)

Similarly, the decision of the court below is to be contrasted with that of the court in *Georgia Truck System* v. *Interstate Commerce Commission*, 123 F. 2d 210, 212 (5th Cir., 1941), where it is stated:

"• • • In the argument much refinement was indulged in, much speculation was raised, many authorities cited, as to how close one might approach the line of transportation without being regarded as having stepped over it. We need not indulge here in any of these refinements. It is sufficient for us to say that the invoked statute is a highly remedial one, that its terms are broadly comprehensive enough to bring within them all of those who, no matter what form they use, are in substance engaged in the business of interstate or foreign transportation of property on the public highways for hire;" • • •

The thrust of the *B & C* and *Georgia Truck* cases, supra, is simply the proposition that if the provisions of the Interstate Commerce Act can be lightly or easily avoided the entire regulatory scheme will be thwarted.[8] The threat to regulated transportation and the accompanying detriment to the public interest flowing from a narrow or restricted interpretation of regulated carriage and a broad or liberal interpretation of private carriage was well stated by the court in *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, 78 F. Supp. 13, 19-20 (D. Minn., 1948), as follows:

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[8] See, also, *Lamb* v. *Interstate Commerce Commission*, 259 F. 2d 358 (10th Cir., 1958); *A. W. Stickle Co.* v. *Interstate Commerce Commission*, 128 F. 2d 155 (10th Cir., 1942); and *Vincze* v. *Interstate Commerce Commission*, 267 F. 2d 577 (9th Cir., 1959).

> "* * * when, as in this case, a transportation service is in fact rendered under the guise of the leasing of vehicles to shippers, the transportation costs and rates become a subject of barter between the vehicle owner or truck rental operator and the shipper. In order to insure to the public equality in rates and service for essential transportation, Congress enacted the Interstate Commerce Act, and if the practice of providing unregulated transportation under the guise of leasing vehicles were to become a general practice, the regulated agencies of transportation would be seriously impaired. Shippers and the public would be deprived of transportation service at equal rates and service."

This Court is here asked to review an interpretation of the regulatory provisions of the Interstate Commerce Act which sanctions as private carriage, and thus carriage beyond the pale of regulation, devices or arrangements designed to escape regulation which in net result so resemble transportation for-hire as to be indistinguishable from it. We respectfully suggest that such arrangements and devices, which necessarily have the effect of eroding the traffic of regulated carriers, were not given the Congressional imprimatur and that the decision of the court below is not in harmony with the National Transportation Policy and the Interstate Commerce Act nor with controlling precedent.

The Mistaken Rationale of the Court Below

The court below concluded that the findings of the Interstate Commerce Commission were not supported by substantial evidence. Thereby it held that Oklahoma actually controlled the transportation of its products and that the owner-operators were not in substance engaged in transportation for-hire. In so doing, it noted that the Commission, in resolving the primary issue, had utilized two tests:

(1) Did any one other than the company (Oklahoma) have any right to control, direct and dominate the transportation involved, and

(2) Were the owner-operators in substance engaged in the business of interstate or foreign transportation of property on the public highways for-hire? (R. 20).

The court recognized that both tests have been approved by the courts (R. 21).

After stating the two tests the court criticized the reasoning of the Commission in using a presumption[7] to reach a conclusion with respect to the first or "control" test (R. 21-22). Thereafter, the court made it plain that it viewed the case as not involving a lease of equipment with drivers, but rather as a lease of equipment alone with drivers to be supplied by Oklahoma (R. 22). Herein lies the fundamental error committed by the court for in so characterizing the case it failed to view the arrangement between Oklahoma and the individual owner-operators as a whole. In other words, it treated the equipment leases in isolation from the union contract covering employment of the lessors as drivers of the leased equipment.

The Interstate Commerce Commission has frequently noted that the two significant instrumentalities of transportation are the equipment and the driver.[8] Similarly, in *Motor Haulage Co.* v. *United States*, 70 F. Supp. 17 (E.D., N. Y. 1947), affirmed per curiam 331 U. S. 784, the court recognized that where the owner of a vehicle merely furnished that vehicle, and the driver was supplied by the

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[7] The presumption was discussed by the Commission in its decision (R. 153-156) and was first set forth by the Commission in *H. B. Church Truck Service Co., Com. Car. Application*, 27 M.C.C. 191 (1940).

[8] See, e.g., *H. B. Church Truck Service Co., Common Carrier Application*, 27 M.C.C. 191 (1940), and *Pacific Diesel Rental Co.—Investigation of Operations*, 78 M.C.C. 161 (1958).

shipper, the owner was not engaged in transportation for-hire. The court further observed, at page 21, that where an equipment owner furnished both the vehicle and the driver, was compensated on a mileage or time basis, paid the hire and other incidental expenses of the driver, agreed to maintain the leased equipment in good order and repair, and to garage and fuel the trucks, but did not undertake specifically to transport cargo or to be responsible for loss or damage, the operation constituted transportation for-hire which required appropriate operating authority from the Interstate Commerce Commission.

And, with respect to the provision to a shipper of both of the significant instrumentalities of transportation the Court of Appeals for the Second Circuit in *Bridge Auto Renting Corp.* v. *Pedrick,* 174 F. 2d 733, 737 (1949) said:

> "We may well start with that part of its business which it is conceded does not make it such a transporter. That is the larger part where it furnishes to its customers trucks which it maintains in operating condition either by repair or substitution and prescribes conditions to be observed by the 'lessees' as to the operation of the trucks. In this operation it performs a very large part of the function of transportation, but it stops short of supplying a feature which is essential to the transportation of anything by means of a truck by failing to provide a driver. If it did provide trucks in this way and in addition its own employees as drivers, with directions to carry the property of its customers where, when and as they directed, it would seem perfectly clear that the money it received for so doing was for performing the service of carrying the property. It would then be doing almost all that any carrier does for its customers.
>
> "In the situation just stated the truck owner would be none the less transporting property because he was paid on a time plus mileage basis for the use of the truck and had no immediate incentive to operate efficiently. The result would be the same though the

> truck owner was merely reimbursed for the out-of-pocket expense of providing the drivers and could have no opportunity to make a profit on that phase of the operation. It is inconceivable that such a transporter of property would not, as a matter of business, have to provide suitable drivers, acceptable to his customers, for performing the kind of transportation undertaken efficiently. Nor would the fact that one or more of the customers itself insured its property as it saw fit while it was being transported make it the transporter."

By viewing the case as it did the court below forecast its ultimate conclusion and invalidated the reasoning which it stated in support of that conclusion. Plainly, the court did not look to the ultimate result achieved by Oklahoma in utilizing the owners of vehicles which it had leased to drive such vehicles. Thereby the court precluded itself from resolving the primary issue stated by it in the language of the Tenth Circuit Court of Appeals in *Lamb* v. *Interstate Commerce Commission*, 259 F. 2d 358, (1958), as: "Simply stated it is who was transporting the goods in question." (R. 17)

Where only one of the two significant instrumentalities of transportation is furnished to a shipper who himself provides the other there cannot be transportation for-hire. The significant issue in this case is whether, when the lessor of a vehicle drives that vehicle in the transportation of the lessee's property even though the lease and the employment contract are separate agreements, the concurrence of the two significant instrumentalities emanating from a single person results in transportation for-hire. Peculiarly in point to this case is the discussion of the Tenth Circuit Court of Appeals in *B & C Truck Leasing, Inc.* v. *Interstate Commerce Commission*, 283 F. 2d 163, 165 (1960), as follows:

> "• • • One engaged exclusively in leasing trucks for use by others in the transportation of their own property on the highways or one engaged solely in

> furnishing drivers to drive trucks for others in the transportation of their own property on the highways, without more, is not required to obtain a certificate of convenience and necessity or a permit issued by the Commission. *Georgia Truck System* v. *Interstate Commerce Commission*, 5 Cir., 123 F. 2d 210. But if the leasing of trucks and the furnishing of drivers are intentionally linked together in a manner to constitute constituent elements in a concert of action which effectuates the transportation of property in interstate commerce for hire without either party to the arrangement having a certificate of convenience and necessity or a permit issued by the Commission, the leasing of the trucks and the furnishing of the drivers as constituent elements of the forbidden transportation are within the reach of the Act. *In other words, such activities in isolation each from the other are not within the purview of the Act; but when they are intentionally bound together as constituent parts of an operation which contravenes the Act, they come within its sanctions. Swift & Co.* v. *United States*, 196 U.S. 375, 396, 25 S.Ct. 276, 49 L. Ed. 518." (Emphasis added)

By initially assuming that the activities of the owner-operators in leasing their vehicles and furnishing themselves as drivers thereof were isolated, the court below failed to consider the result of their being bound together as constituent parts of a single operation, and thereby failed to appraise the substance of the transaction. Accordingly, the court below erred in setting aside the order of the Interstate Commerce Commission.

The Individual Owner-Operators Are In Substance Engaged In Transportation For-Hire

The essential inquiry in this case is whether the transportation of Oklahoma's property under the circumstances described constitutes carriage for-hire on the part of the individual owner-operators. In the words of the Tenth Circuit Court of Appeals in *Lamb* v. *Interstate Commerce Commission*, 259 F. 2d 358 (1958), the question is "who

was transporting the goods in question." In that case, pages 360-361, the court succinctly stated the approach to the resolution of the issue by quoting its own decision in *A. W. Stickle & Co.* v. *Interstate Commerce Commission*, 128 F. 2d 155, 160, cert. den. 317 U. S. 650, as follows:

> "'A carrier may not avoid the requirements of Part II, supra, by subterfuge or device, or by posing as a private carrier when, in substance and reality, he is engaged under individual contracts in transportation by motor vehicle of property in interstate commerce for compensation. Ownership of the commodity transported is not the sole test. The primary test in §§ 203(a) (14) and 203 (a) (15) [49 U.S.C.A. § 303 (a) (14, 15)] is transportation for compensation.' (Footnotes omitted.) 128 F. 2d 160.
>
> • • • •
>
> "• • • The history of Poynor and Lamb Trucking shows that its essential business is that of transportation, not the rental of motor vehicles. • • •"

In its decision in the *Stickle* case the Tenth Circuit Court of Appeals referred to and quoted *Georgia Truck System* v. *Interstate Commerce Commission*, 123 F. 2d 210 (5th Cir., 1941). In the latter case it was plainly stated that the substance of transportation arrangements determines the type of carriage being performed. The language of the court in that case, previously quoted herein, is particularly apposite to the case at bar.

The significance and importance of relying upon substance rather than form for determining the nature of a transportation service in view of the well recognized purposes of the Interstate Commerce Act is exemplified by the following discussion from the decision of the court in *Interstate Commerce Commission* v. *F. & F. Truck Leasing Co.*, 78 F. Supp. 13, 19-20 (D. Minn., 1948):

> "It is the frequent practice in the motor carrier industry for carriers to augment their over-the-road

equipment by leasing vehicles from owner-operators who are also employed to drive the vehicles. Owner-operators who own or control several units of equipment are in fact engaged in the truck rental business. The traffic handled in such leased equipment by an owner-operator becomes an integral part and parcel of the authorized carrier's operations. The published rates of the lessee carrier control the transportation costs to the public, and as to the operations of such leased vehicle the lessee carrier assumes full responsibility for compliance with all applicable statutes and the rules of the Commission governing the duties of the carrier to the shipper and to the public generally (*Dixie Ohio Express* case, 17 M.C.C. 735, 752). This practice by authorized carriers does not impair necessary public regulation. On the other hand, when, as in this case, a transportation service is in fact rendered under the guise of the leasing of vehicles to shippers, the transportation costs and rates become a subject of barter between the vehicle owner or truck rental operator and the shipper. In order to insure to the public equality in rates and service for essential transportation, Congress enacted the Interstate Commerce Act, and *if the practice of providing unregulated transportation under the guise of leasing vehicles were to become a general practice, the regulated agencies of transportation would be seriously impaired.* Shippers and the public would be deprived of transportation service at equal rates and service." (Emphasis added)

Implicit in the case at bar is the simple fact that the purpose or motive of the individual owner-operators is to profit from the utilization of their vehicles and their services in the transportation of Oklahoma's goods. Inasmuch as they neither undertake nor perform any other activity on behalf of Oklahoma, and inasmuch as their compensation is measured by and limited to the quantum of transportation performed, the sum and substance of their activity is necessarily transportation for-hire regardless of paper arrangements or separate contracts for the separate elements which, taken together, yield the total

service. Such was the holding of the court in *United States* v. *La Tuff Transfer Service*, 95 F. Supp. 375, 380-381 (D. Minn., 1950), where the following statement appears:

> "In determining the status of a lessor of motor equipment when vehicles are used by a shipper, the courts have disregarded form, and look only to the substance. * * *
>
> * * * *
>
> "Motor carrier operations must be bona fide and conducted in good faith, without a shadow of subterfuge or attempted evasion of the letter or obligation of the law. Any plan or scheme, whether by purported lease, agency, or other device disguising the true nature of the transportation will be of no avail for that purpose. *Where one's object in the transportation of property on public highways is to earn compensation for the use of his equipment and his services, he cannot evade regulation by execution of leases or other agreements which purport to give the alleged lessee the status of a private carrier. Interstate Commerce Commission* v. *Isner*, D. C., 92 F. Supp. 582, 583; *Interstate Commerce Commission* v. *F & F Truck Leasing Company*, D. C., 78 F. Supp. 13; *Georgia Truck System* v. *I.C.C.*, 5 Cir., 123 F. 2d 210; *Interstate Commerce Commission* v. *Pickard*, D. C., 42 F. Supp. 351; *John J. Casale, Inc., Contract Carrier Application*, 44 M.C.C. 45, 49 M.C.C. 15; and *Bridge Auto Renting Corporation* v. *Pedrick*, 2 Cir., 174 F. 2d 733." (Emphasis added)

The facts in the case at bar bring it squarely within the doctrine of the cases cited above. Here, each owner-operator stands in the position of an individual entrepreneur for each assumes the entire risk of profit or loss from the transportation service performed by him. With respect to each, Oklahoma simply purchases transportation service at a fixed cost per mile.

Each owner-operator ordinarily drives his own tractor which he has leased to Oklahoma and, indeed, Oklahoma

has a definite policy of having the owner of the vehicle drive it (R. 76, 81). Each owner-operator is responsible for the repair and maintenance of his equipment and while there is some testimony in the record to suggest that Oklahoma inspects the leased vehicles the nature of that testimony suggests that such inspection is at most a matter of form in order to comply with suggestions made by field personnel of the Interstate Commerce Commission (R. 69-70). In any event, the record is clear in demonstrating that the owner-operators bear the expense of repair and maintenance and make the arrangements for such repair and maintenance themselves (R. 51, 53, 56, 60, 67). Additionally, the owner-operators pay their own living expenses while they are on the road. (R. 143) And they also pay all operating costs such as gas, oil, grease, parts, and license fees. (R. 110) For these services they are paid on the basis of cents per mile, receiving one check covering the vehicle lease and one check covering the driver services.

The services of the owner-operators are not used every day, but only when Oklahoma has a load to be transported. And when they are not used they receive no pay (R. 63, 78, 86). Each owner-operator uses his own vehicle for transportation between his home and Oklahoma's plant, and garages the equipment at his home (R. 68-69). The fair conclusion is that the vehicle of each owner-operator remains in his physical possession as opposed to being in the physical possession of Oklahoma. Indeed, the lease agreement specifically provides that Oklahoma will not be responsible for damage to the vehicle from any cause and states that if the owner-operator carries collision, fire, theft, or any other type of insurance he must do so at his own expense. (R. 111-112)

Both the court below and the Commission found that when an owner-operator is to transport a load of Oklahoma's products he is instructed as to routes and delivery

points and given a truck bill manifest. But let there be no misunderstanding as to the nature of the "routing instruction." The record is clear in revealing that the owner-drivers are not given detailed instructions with respect to each trip. Rather, they were at one time given a route sheet which they should still have, if it has not been lost. Oklahoma assumes that they take the short route between points as shown by that route sheet (R. 72). The owner-operators, having been advised of the delivery points and given a truck bill manifest, transports the property to destination, picks up a return load, if any, delivers that to Oklahoma, and goes home. These elements, far from indicating that the transportation operation is that of Oklahoma in private carriage, are but the normal incidents of any contract carrier service dedicated to a particular shipper.[9]

In reviewing both the Commission's determination that the owner-operators are in substance engaged in trans-

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[9] *R.N.G. Commercial Auto Rentals, Inc., Contract Carrier Application*, 73 M.C.C. 665, 669 (1957). See also, *McKeown Transp. Co., Contract Carrier Application*, 42 M.C.C. 792, 796 (1943), where the Commission said:

> "* * * Although it is stated that the vehicles are under the direction of the shipper to which they are assigned, this direction does not appear to have consisted of anything more than instructions as to the points at which deliveries were to be made and the time at which a trip should be operated. Such practices are natural concomitants of any contract-carrier operations under which specified units of equipment are devoted exclusively to the needs of a single shipper and do not necessarily imply direction and control by the shipper. * * *"

And see *Allen* v. *United States*, 187 F. Supp. 625, 629 (S.D. Fla., 1960) where the court said:

> "* * * The shipper exercised little, if any, control over the vehicle or driver. The assertion that the shippers directed the place of delivery carries no weight to support the conclusion that the transportation was private, since in transportation for hire, the shippers must always, of course, instruct the carriers where to deliver the load. * * *"

portation for-hire, and the discussion of the same point by the court below, the striking and significant similarity of those operations to the definition of contract carriage in Section 203(a) (15) of the Interstate Commerce Act (49 U.S.C. 303(a) (15)) cannot fail to be noted. That section provides:

> "The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation * * * under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

The remarkable resemblance between the transportation operations here involved and the definition of contract carriage can be readily seen in the statement of the Commission in its decision, 79 M.C.C. 403, 412 (R. 156-157), as follows:

> "Here each owner-operator assigns his motor vehicle for a continuing period of time to the exclusive use of the Company, furnishing a service designed to meet the distinct need of the Company. He provides a service in which the equipment is furnished, maintained, and driven by the owners thereof to transport property in interstate commerce. He guarantees a fixed and definite cost for the transportation, bears the risk of profit or loss from such transportation hazards as delays in transit, breakdowns of equipment, and highway detours, and meets all of the cost of operation including appropriate licenses and trip expenses. * * *"

The law is clear that where, absent appropriate authority, the substance of an arrangement is transportation for-hire it is in violation of the Interstate Commerce Act regardless of the paper forms under which the opera-

tion may be conducted.[10] Thus, in *Interstate Commerce Commission* v. *Werner*, 106 F. Supp. 497, 500 (F. D., Ill., 1951), the court based its decision that the operations there involved constituted carriage for-hire on the substance of the arrangement, saying:

> "The issue of whether a contract carrier status subject to regulation exists between the parties and as to Lawrence R. Werner is to be determined by how much service which goes with ordinary contract carriage for compensation on public highways in interstate commerce was being furnished by defendant Lawrence R. Werner in addition to th leased vehicles; also whether on the whole a transportation service was being rendered by him to Centralia Petroleum Co., rather than simply furnishing for private operation the vehicles to it, in the same manner as would normally obtain if it were the owner of the equipment. * * *"

Similarly, the Tenth Circuit Court of Appeals in *Lamb* v. *Interstate Commerce Commission*, supra, based its ultimate conclusion on the resolution of the question of whether the operations there involved were in subetance carriage for-hire. See, also, the decision of the Tenth Circuit Court of Appeals in *B & C Truck Leasing* v. *Interstate Commerce Commission*, supra. Indeed, to hold otherwise would be to abrogate the broad scope and remedial nature of the Interstate Commerce Act by permitting paper form to take precedence over actual fact. Therefore, "where one's object in the transportation of property on public highways is to earn compensation for the use of his equipment and his services, he cannot evade regulation by execution of leases or other agreements

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[10] *Georgia Truck System* v. *Interstate Commerce Commission*, 123 F.2d 210 (5th Cir. 1941); *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, 78 F. Supp. 13 (D. Minn. 1948); *Lamb* v. *Interstate Commerce Commission*, 259 F.2d 358 (10th Cir. 1958); and *B & C Truck Leasing, Inc.* v. *Interstate Commerce Commission*, 283 F.2d 163 (10th Cir. 1960).

which purport to give the alleged lessee the status of a private carrier." [11]

In the case at bar the individual owner-operators each provide to Oklahoma both equipment and a driver. They assume all of the burdens and costs of the transportation operation including vehicle maintenance and repair with only two exceptions. First, they do not provide cargo insurance, but this is not persuasive as to the nature of the carriage performed for contract carriers are not required to provide such protection.[12] Second, Oklahoma, as the shipper and "paper lessee," provides public liability and property damage insurance. Significantly, this is the only tangible burden or responsibility with respect to the conduct of the transportation operation which Oklahoma assumes. And this is of little moment in determining whether the owner-operators are engaged in carriage for-hire for, as the Commission has held:[13]

> "* * * In the last analysis a shipper's assumption of any of a carrier's responsibility to the public, in this day when such responsibilities readily can be passed on to insurers, is little more nor less than a rate adjustment."

On the basis of the facts it is apparent that Oklahoma has endeavored to avoid regulation under the Interstate Commerce Act by giving to the transportation of its property the character of private carriage, but has at the same time attempted to avoid the burdens and risks attendant upon the conduct of transportation service. No matter how sincere the motives of Oklahoma or of the individual

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[11] *United States* v. *La Tuf Transfer Service*, 95 F. Supp. 375, 381 (D. Minn., 1950).

[12] *Motor Haulage Co., Contract Carrier Application*, 46 M.C.C. 107, 117 (1946), aff'd 70 F. Supp. 17, aff'd. per curiam 331 U. S. 784.

[13] *Pacific Diesel Rental Co.—Investigation of Operations*, 78 M.C.C. 161, 172 (1958).

owner-operators the facts reveal that in substance each owner-operator is engaged in carriage for-hire. As the court said in *Interstate Commerce Commission* v. *Pickard*, 42 F. Supp. 351, 354 (W.D., N. Y., 1941):

> "We do not question the sincerity of purpose of the parties in making this lease. We do not question that they believed that by this means the corporation became a private carrier and not subject to the provisions of the Motor Carrier Act. We believe that their efforts were honestly made, but we also believe that the purpose sought was not accomplished."

In the case at bar the individual appellees have entered into arrangements with Oklahoma under which each leases to Oklahoma a motor vehicle and by separate agreement each is hired to drive that motor vehicle. Each owner-operator assumes the principal burdens and responsibilities of providing transportation to the extent that each bears all significant costs of providing such service and assumes the risk of profit or loss from the rendition of such service. We respectfully submit that only one conclusion as to the status of the transportation operations of these appellees is possible. That is, that each of the individual owner-operators has engaged in unlawful transportation for-hire. But more importantly, the facts and the law considered, it cannot be said that the judgment of the Interstate Commerce Commission lacks a rational basis,[14] is not warranted,[15] is not sensible,[16] is not supported by substantial evidence,[17] or is arbitrary, capri-

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[14] *Miss. Valley Barge Line Co.* v. *United States*, 292 U.S. 282 (1934).

[15] *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 (1939) and *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515 (1946).

[16] *Grey* v. *Powell*, 314 U.S. 402 (1941).

[17] *Rice & Co., Inc.* v. *United States*, 100 F. Supp. 468 (W. D., Mo.,) aff'd. 342 U. S. 937, rehearing denied 343 U.S. 937.

cious, or an abuse of discretion. The court below has failed to give the findings and conclusions of the Interstate Commerce Commission the special weight to which they are entitled,[18] and its opinion should be reversed.

CONCLUSION

The Interstate Commerce Act is remedial and its terms are sufficiently broad to include within them all those who, no matter what form they use, are in substance engaged in the business of interstate transportation for-hire.[19] Accordingly, motor carrier operations must be conducted in good faith without subterfuge or attempted evasion of the letter or obligation of the law.[20] And, similarly, bona fide attempts to avoid the Act which nevertheless result in substance in carriage for-hire fall short of their goal and such transportation is unlawful.[21] If the practice of avoiding transportation regulation through the guise of leasing vehicles were to be easily accomplished or to become general, the regulated agencies of transportation would be seriously impaired and the public denied transportation service at equal rates and charges.[22]

The Oklahoma Furniture Manufacturing Company receives from the individual owner-operators all of the essential elements of a for-hire transportation service. The substance of the arrangement between the parties is that the owner-operators assume the burdens and risks of pro-

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[18] *Levinson* v. *Spector Motor Service*, 330 U.S. 649 (1947).

[19] *Georgia Truck System* v. *Interstate Commerce Commission*, 123 F. 2d 210 (5th Cir., 1941).

[20] *United States* v. *La Tuff Transfer Service*, 95 F. Supp. 375 (D. Minn., 1950).

[21] *Interstate Commerce Commission* v. *Pickard*, 42 F. Supp. 351 (W. D., N. Y. 1941).

[22] *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, 78 F. Supp. 13 (D. Minn., 1948).

viding a service for which they are paid by Oklahoma on the basis of the quantum of service rendered. This is essentially what any for-hire carrier does, and when performed in the absence of appropriate operating authority issued by the Interstate Commerce Commission it results in a violation of the Interstate Commerce Act.

WHEREFORE, the Regular Common Carrier Conference of American Trucking Associations, Inc., respectfully prays this Honorable Court to reverse the judgment of the court below and to remand the case with instructions to dismiss the complaint.

Respectfully submitted,

REGULAR COMMON CARRIER CONFERENCE
of the
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August 25, 1961

APPENDIX

National Transportation Policy, 49 U.S.C. preceding §§1, 301, 901 and 1001

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;— all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 203(a)(15), Definition of "Contract Carrier by Motor Vehicle," 49 U.S.C. 303(a)(15).

> "The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exceptions therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person

served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

Section 203(a)(16), Definition of "Motor Carrier," 49 U.S.C. 303(a)(16).

"The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle."

Section 203(a)(17), Definition of "Private Carrier of Property by Motor Vehicle," 49 U.S.C. Section 303(a)(17).

"The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commerical enterprise."

Section 203(c), Regulation of For-Hire Transportation, 49 U.S.C. 203(c).

"Except as provided in section 202(c), section 203 (b), in the exception in section 203 (a) (14), and in the second proviso in section 206 (a) (1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign

commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person."

Section 209(a)(1), Permits for Contract Carriers by Motor Vehicle, 49 U.S.C. 309(a)(1).

"Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: * * *"

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 23

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

HENRY E. DRUM, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the district court (R. 13–24) is reported at 193 F. Supp. 275.

JURISDICTION

The judgment of the district court was entered on August 13, 1960 (R. 25). The United States and the Interstate Commerce Commission filed notice of appeal on October 12, 1960 (R. 26–28, 31–33), and this Court noted probable jurisdiction on March 20, 1961. 365 U.S. 839. The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b).

QUESTION PRESENTED

Each of the individual appellees owns a truck tractor which he operates under a leasing arrangement with the Oklahoma Furniture Company in the interstate transportation of the company's furniture to various dealers located at different points throughout the United States and in the back-haul of raw materials used by the company in the manufacture of its products. The owner-operators are compensated for the use of their trucks and for their services as drivers solely on the basis of the number of miles driven; they bear all of the operating costs of the transportation, including the cost of gasoline, grease and oil, parts, and any necessary commercial license plates, and are responsible for the maintenance and repair of their equipment. The company does not obligate itself to provide any minimum amount of shipments; it uses the services and equipment of the owner-operators only when it chooses.

The question presented is whether transportation of a shipper's goods by motor vehicles driven and maintained by their owners, under the conditions mentioned above, constitutes "transportation * * * for compensation" performed by the owner-operators, subject to economic regulation under the Interstate Commerce Act.

STATUTES INVOLVED

Sections 203(a) and 209(a) of the Interstate Commerce Act (49 Stat. 544, 552, as amended, 49 U.S.C. 303, 309(a)) provide in part as follows:

> SEC. 203(a). *Definitions.*
> As used in this part—
>
> * * * * *

(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) of this section and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

* * * * *

(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

* * * * *

SEC. 203(c). Except as provided in section 202(c), section 203(b), in the exception in section 203(a)(14), and in the second proviso in section 206(a)(1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to

such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.

* * * * *

SEC. 209(a)(1). Except as otherwise provided in this section in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business * * *.

STATEMENT

1. This is a direct appeal from the final judgment of a three-judge district court setting aside and annulling an order of the Interstate Commerce Commission entered on April 22, 1959 (R. 166). The Commission had found (R. 156–157) that interstate transportation services rendered to the Oklahoma Furniture Company ("Oklahoma") by the owner-operators of tractors pursuant to a lease arrangement that purported to give Oklahoma control of the operations were essentially the same as those normally provided by contract carriers since the owner-operators assured the shipper complete transportation at a fixed and

definite cost and assumed all of the financial risks of the operation. On this ground, among others, the Commission directed the owner-operators to refrain from engaging in such transportation without obtaining appropriate authority from the Commission (R. 166). The three-judge court set aside the Commission's findings and order on the ground that Oklahoma's retention of "control" of the operations made the transportation private carriage not subject to economic regulation under the Interstate Commerce Act.

The relevant facts, which are not in dispute, are as follows:

Oklahoma is engaged in the manufacture and sale of low-priced furniture sold to retail dealers throughout the United States. Prior to October 1952, Oklahoma shipped its manufactured product to retailers in company-owned tractors and trailers[1] operated by full-time salaried employees of the company. It was discovered, however, that a number of these drivers were defrauding the company by various schemes involving the improper use of company credit cards[2] which had been issued to the drivers for the purpose of charging truck and living expenses on the road. Thereafter, Oklahoma decided to change its long-haul operations to a system whereby the drivers would own and maintain their own tractors, which would be

[1] For heavy hauling of the type involved here, the "truck" consists of a "tractor", the front-end motive power, to which are attached "trailers", without power of their own, in which the freight is physically placed.

[2] The company computed its credit-card losses over a three year period at approximately $27,000 (R. 106).

leased to the company, the drivers being compensated on a mileage basis with an adjustment for back hauls of raw materials.[3]

"The principal reason Oklahoma changed its operations to the lease agreement was to avoid drivers' breaches of trust, and to reduce its cost of operation" (R. 106, 82), for the company's management was of the opinion "that a man operating his own tractor would operate it more carefully and be more careful to properly maintain [the] tractor when he was responsible not only for the cost of maintenance but for any deterioration on [the] vehicle due to improper maintenance" (R. 106). Accordingly, lease arrangements (Ex. 3, R. 114–119) were initially drawn up which required that the owner-operator, at his own expense, provide property damage and public liability insurance covering the operation of the leased vehicle (R. 117), comply with workmen's compensation laws with respect to all persons engaged in the operation (*ibid.*), pay social security taxes (*ibid.*), and bear the expense of all licenses, public utility franchise and permit fees, and all applicable taxes (R. 117–118). The owner-operator was also made liable to Oklahoma, when pulling a company-owned trailer, to the extent of $250, for any damage other than ordinary wear occurring to the trailer while in his custody or attached to his tractor (R. 118). The owner-operator reserved the right to operate the leased equipment in the serv-

[3] Oklahoma retained a few full-time salaried drivers primarily for short-haul operations and presently owns and maintains six tractor units (R. 77, 78–79). Eleven tractors are leased from owner-operators under the present plan (R. 77).

ice of any other concern when not engaged in the business of the company (R. 116).[4]

Subsequently, in 1955, after one of the owner-operators had been arrested in Arkansas for operating without appropriate authority on the highways of that state as a motor vehicle carrier, a suit was filed in the Arkansas state courts for a declaratory judgment that such owner-operators were not motor carriers within the meaning of the applicable Arkansas statute. In *Robinson* v. *Woodard*, 227 Ark. 102, 296 S.W. 2d 672 (1956), certiorari denied, 353 U.S. 988, the Supreme Court of Arkansas held that the arrested owner-operator was performing a transportation service, not as an employee of Oklahoma, but as a contract motor carrier. This litigation resulted in the execution, in July 1957, of a new lease (Ex. 2, R. 109–113) designed to "make [the owner-operators] employees" (R. 90, 91). This is the lease now in effect.

Under the terms of the present lease, Oklahoma has the sole right to control the use of the vehicles (R. 111); and it may not sub-lease the vehicle to a third party during the life of the agreement (*ibid.*). The lease is to last for one year (R. 112), but each party may cancel on 30 days' notice (*ibid.*). Payment for the use of the vehicle and for the owner's services as driver is based exclusively on mileage (R. 109–110, 142–143), computed by the company on the basis of the shortest point-to-point route (R. 110, 72). If the vehicle is not used no payment is due. Oklahoma

[4] The initial lease was replaced by a substantially similar lease in 1956 (Ex. 4, R. 121–127).